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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 25, and 52

[FAC 2005-57; FAR Case 2012-004; Docket 2012-0004, Sequence 1]

RIN 9000-AM18

Federal Acquisition Regulation; United States–Korea Free Trade Agreement

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement the United States–Korea Free Trade Agreement. The Republic of Korea is already party to the World Trade Organization Government Procurement Agreement, but this trade agreement implements a lower procurement threshold.

DATES: Effective Date: March 15, 2012.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before [insert date 60 days after FEDERAL REGISTER publication date] to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-57, FAR Case 2012-004, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2012-004" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2012-004." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-004" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration,
Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275
First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005-57, FAR Case 2012-004, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Erwin,
Attorney-Advisor in the Office of Governmentwide Policy, at
202-501-2164 for clarification of content. For information
pertaining to status or publication schedules, contact the
Regulatory Secretariat at 202-501-4755. Please cite FAC
2005-57, FAR Case 2012-004.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule amends FAR part 25 and the corresponding provisions and clauses in part 52 to implement the United States–Korea Free Trade Agreement (see the United States–Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. 3805 note)).

The Republic of Korea is already party to the World Trade Organization Government Procurement Agreement (WTO GPA). This Free Trade Agreement (FTA) now covers acquisition of supplies and services between \$100,000 and the current WTO GPA threshold of \$202,000, lowering the threshold for—

- Waiver of the applicability of the Buy American statute (41 U.S.C. chapter 83) for some foreign supplies and construction materials from the Republic of Korea; and
- Applicability of specified procurement procedures designed to ensure fairness in the acquisition of supplies and services (see FAR 25.408). These obligations include, among others, that an agency shall not impose the condition that, in order for an offeror to be allowed to submit an offer or be awarded a contract, the offeror has been previously awarded one or more contracts by an agency of the United States Government or that the offeror has

prior work experience in the United States (see FAR 15.305(a)(2)(iv)).

II. Discussion and Analysis

This interim rule adds the Republic of Korea to the definition of "Free Trade Agreement country" in multiple locations in the FAR. The Republic of Korea was already listed as a designated country because it is party to the WTO GPA. The excluded services for Korea FTA are the same as for the WTO GPA.

By implementation of this Korea FTA, eligible goods and services from Korea are now covered when valued at or above \$100,000, rather than at or above the WTO GPA threshold of \$202,000. The threshold for the Korea FTA for construction is the same as the threshold for the WTO GPA for construction.

The Korea FTA \$100,000 threshold for supplies and services is higher than the threshold for supplies and services for most of the FTAs (\$77,494), but not as high as the Bahrain, Morocco, Oman, and Peru FTA threshold for supplies and services (\$202,000). Therefore, new alternates are required for the Buy American Act-Free Trade Agreements-Israeli Trade Act provision and clause (FAR 52.225-3 and 52.225-4) to cover acquisitions that are valued at \$77,494 or more but less than \$100,000. In that dollar range, all

FTAs are applicable except for the Bahrain, Korea, Morocco, Oman, and Peru FTAs.

Because the Korea FTA construction threshold of \$7,777,000 is the same as the WTO GPA threshold, no new clause alternates are required for the Buy American Act—Construction Materials under Trade Agreements provision and clause (FAR 52.225-11 and 52.225-12) or the Recovery Act clauses at FAR 52.225-23 and 52.225-24.

Some minor editorial type corrections are also included in this rule to—

- Include the public law number and 19 U.S.C. reference for all Free Trade Agreements;
- Correct references to 41 U.S.C. chapter 83 and 41 U.S.C. 1907 (based on the recent positive law codification of title 41);
- Delete an unnecessary definition of “Canadian end product” in FAR 25.003 (term is only used in the provisions and clauses, and is defined at FAR 52.225-3 Buy American Act - Free Trade Agreements - Israeli Trade Act); and
- Provide consistency in paragraph (c) of FAR 52.225-3 between basic clause and alternates, except to the extent that a change is required due to the applicability of trade agreements. This consists of adding to Alternates I and II the statement that the

Buy American Act provides a preference for domestic goods, and that the component test of the Buy American Act has been waived for end products that are commercially available off-the-shelf items, in accordance with 41 U.S.C. 1907.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Korea is already a designated country under the WTO GPA. Although the rule now opens up

Government procurement to the goods and services of Korea at or above the threshold of \$100,000, DoD, GSA, and NASA do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at Defense Federal Acquisition Regulation Supplement 225.401-70, and acquisitions that are set aside or provide other form of preference for small businesses are exempt. FAR 19.502-2 states that acquisitions of supplies or services with an anticipated dollar value between \$3,000 and \$150,000 (with some exceptions) are automatically reserved for small business concerns. Therefore, DoD, GSA, and NASA have not performed an Initial Regulatory Flexibility Analysis.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2012-004), in correspondence.

V. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provisions at FAR 52.212-3,

52.225-4, 52.225-6, and 52.225-11 currently approved under OMB clearances 9000-0136, 9000-0130, 9000-0025, and 9000-0141 respectively, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because it is just a question of which category offered goods from the Republic of Korea would be listed under.

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Free Trade Agreement with the Republic of Korea takes effect on March 15, 2012. This is a reciprocal agreement, approved by Congress and the President of the United States. It is important for the United States Government to honor its new trade obligations to the Republic of Korea, as the Republic of Korea in turn honors its new trade obligations to the United States. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD,

GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 25, and 52

Government procurement.

Dated: March 1, 2012.

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 4, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

2. Amend section 4.1202 by revising paragraph (v) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(v) 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternates I, II, and III).

* * * * *

PART 25—FOREIGN ACQUISITION

25.003 [Amended]

3. Amend section 25.003 by—

- a. Removing the definition "Canadian end product";
- b. In paragraph (2) of the definition "Designated country" removing "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place; and
- c. In the definition "Free Trade Agreement country" removing "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place.

4. Amend section 25.400 by—

a. Removing from paragraph (a)(2)(i) "Act of 1993" and adding "Act of 1993 (Pub. L. 103-182)" in its place;

b. Removing from paragraph (a)(2)(ii) "Act (Pub. L. 108-77" and adding "Act (Pub. L. 108-77) (19 U.S.C. 3805 note)" in its place;

c. Removing from paragraph (a)(2)(viii) "and";

d. Removing from paragraph (a)(2)(ix) ";" and adding "; and" in its place; and

e. Adding paragraph (a)(2)(x).

The added text reads as follows:

25.400 Scope of subpart.

(a) * * *

(2) * * *

(x) Korea FTA (the United States–Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. 3805 note));

* * * * *

25.401 [Amended]

5. Amend section 25.401 in the table that follows paragraph (b) by removing from the table heading "WTO GPA" and adding "WTO GPA AND KOREA FTA" in its place; and by removing from paragraph (6) "- V503".

6. Amend section 25.402 by revising the table that follows paragraph (b) to read as follows:

25.402 General.

* * * *

(b) * *

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	\$202,000	\$202,000	\$7,777,000
FTAs			
Australia FTA	77,494	77,494	7,777,000
Bahrain FTA	202,000	202,000	10,074,262
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	77,494	77,494	7,777,000
Chile FTA	77,494	77,494	7,777,000
Korea FTA	100,000	100,000	7,777,000
Morocco FTA	202,000	202,000	7,777,000
NAFTA			
—Canada	25,000	77,494	10,074,262
—Mexico	77,494	77,494	10,074,262
Oman FTA	202,000	202,000	10,074,262
Peru FTA	202,000	202,000	7,777,000
Singapore FTA	77,494	77,494	7,777,000
Israeli Trade Act	50,000	—	—

7. Amend section 25.1101 by adding paragraphs

(b) (1) (iv) and (b) (2) (iv) to read as follows:

25.1101 Acquisition of supplies.

* * * *

(b) (1) * * *

(iv) If the acquisition value is \$77,494 or more but is less than \$100,000, use the clause with its Alternate III.

(2) * * *

(iv) If the acquisition value is \$77,494 or more, but is less than \$100,000, use the provision with its Alternate III.

* * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.204-8 by revising the date of the provision and the introductory text of paragraph

(c) (1) (xvii); and adding paragraph (c) (1) (xvii) (D).

The revised and added text reads as follows:

52.204-8 Annual Representations and Certifications.

* * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (MAR 2012)

* * * *

(c) (1) * * *

(xvii) 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate. (Basic, Alternates I, II, and III.) This provision applies to solicitations containing the clause at 52.225-3.

* * * *

(D) If the acquisition value is \$77,494 or more but is less than \$100,000, the provision with its Alternate III applies.

* * * * *

9. Amend section 52.212-3 by—

- a. Revising the date of the provision;
- b. Redesignating paragraph (g) (4) as paragraph (g) (5);
- c. Adding a new paragraph (g) (4); and
- d. Removing from the newly redesignated paragraph (g) (5) (i) "paragraph (g) (4) (ii)" and adding "paragraph (g) (5) (ii)" in its place.

The revised and added text reads as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS
(MAR 2012)

* * * * *

(g) * * *

(4) Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, Alternate III. If Alternate III to the clause at 52.225-3 is included in this solicitation, substitute the following paragraph (g) (1) (ii) for paragraph (g) (1) (ii) of the basic provision:

(g) (1) (ii) The offeror certifies that the following supplies are Free Trade Agreement country end products (other than Bahrainian, Korean, Moroccan, Omani, or Peruvian end products) or Israeli end products as defined in the

clause of this solicitation entitled "Buy American Act—Free Trade Agreements—Israeli Trade Act":

Free Trade Agreement Country End Products (Other than Bahrainian, Korean, Moroccan, Omani, or Peruvian End Products) or Israeli End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[List as necessary]

* * * * *

10. Amend section 52.212-5 by revising the date of the clause, and paragraphs (b) (40) and (b) (41) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (MAR 2012)

* * * * *

(b) * * *

___(40)(i) 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act (MAR 2012) (41 U.S.C. chapter 83, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, 19 U.S.C. 3805 note, 19 U.S.C. 4001 note, Pub. L. 103-182, Pub. L. 108-77, 108-78, 108-286, 108-302, 109-53, 109-169, 109-283, 110-138, and Pub. L. 112-41).

___(ii) Alternate I (MAR 2012) of 52.225-3.

___(iii) Alternate II (MAR 2012) of 52.225-3.

___(iv) Alternate III (MAR 2012) of 52.225-3.

___(41) 52.225-5, Trade Agreements (MAR 2012) (19 U.S.C. 2501, et seq., 19 U.S.C. 3301 note).

* * * * *

11. Amend section 52.225-3 by—

a. Revising the date of the provision;

b. In paragraph (a) in the definition "Free Trade Agreement country" removing "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place;

c. Removing from the first sentence of paragraph (c) "(41 U.S.C. 10a - 10d)" and adding "(41 U.S.C. chapter 83)" in its place;

d. Removing from the second sentence of paragraph (c) "41 U.S.C. 431" and adding "41 U.S.C. 1907" in its place;

e. Removing from the introductory text of Alternate I "(JAN 2004)" and adding "(MAR 2012)" in its place;

f. Removing from the first sentence in paragraph (c) of Alternate I "The Contracting Officer" and adding "41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer" in its place;

g. Removing from the introductory text of Alternate II "(JAN 2004)" and adding "(MAR 2012)" in its place;

h. Removing from the first sentence in paragraph (c) of Alternate II "The Contracting Officer" and adding "41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer" in its place; and

i. Adding Alternate III.

The revised and added text reads as follows:

52.225-3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (MAR 2012)

* * * * *

Alternate III (MAR 2012). As prescribed in 25.1101(b)(1)(iv), delete the definition of "Bahrainian, Moroccan, Omani, or Peruvian end product" and add in its place the following definition of "Bahrainian, Korean, Moroccan, Omani, or Peruvian end product" in paragraph (a) of the basic clause; and substitute the following paragraph (c) for paragraph (c) of the basic clause:

Bahrainian, Korean, Moroccan, Omani, or Peruvian end product means an article that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Korea (Republic of), Morocco, Oman, or Peru; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Korea (Republic of), Morocco, Oman, or Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(c) Delivery of end products. 41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer has determined that FTAs (except the Bahrain, Korea (Republic of), Morocco, Oman, and Peru FTAs) and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled "Buy American Act-Free Trade Agreements-Israeli Trade Act Certificate." If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahrainian, Korean, Moroccan, Omani, or Peruvian end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahrainian, Korean, Moroccan, Omani, or Peruvian end product), an Israeli end product or, at the Contractor's option, a domestic end product.

12. Amend section 52.225-4 by adding Alternate III to read as follows:

52.225-4 Buy American Act-Free Trade Agreements-Israeli Trade Act Certificate.

* * * * *

Alternate III (MAR 2012). As prescribed in 25.1101(b)(2)(iv), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Free Trade Agreement country end products (other than Bahrainian, Korean, Moroccan, Omani, or Peruvian end products) or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act-Free Trade Agreements-Israeli Trade Act":

Free Trade Agreement Country End Products (Other than Bahrainian, Korean, Moroccan, Omani, or Peruvian End Products) or Israeli End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[List as necessary]

13. Amend section 52.225-5 by-

a. Revising the date of the clause; and

b. In paragraph (a) in the definition "Designated country" removing from paragraph (2) "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place.

The revised text reads as follows:

52.225-5 Trade Agreements.

* * * * *

TRADE AGREEMENTS (MAR 2012)

* * * * *

14. Amend section 52.225-11 by-

a. Revising the date of the clause;

b. In paragraph (a) in the definition "Designated country" removing from paragraph (2) "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place;

c. Removing from the first sentence of paragraph (b) (1) "(41 U.S.C. 10a - 10d)" and adding "(41 U.S.C. chapter 83)" in its place;

d. Removing from the second sentence of paragraph (b) (1) "41 U.S.C. 431" and adding "41 U.S.C. 1907" in its place;

e. Removing from the introductory text of Alternate I "(JUN 2009)" and adding "(MAR 2012)" in its place;

f. Removing from the first sentence in paragraph (b) (1) of Alternate I "(41 U.S.C. 10a - 10d)" and adding "(41 U.S.C. chapter 83)" in its place; and

g. Removing from the second sentence in paragraph (b) (1) of Alternate I "41 U.S.C. 431" and adding "41 U.S.C. 1907" in its place.

The revised text reads as follows:

52.225-11 Buy American Act—Construction Materials under Trade Agreements.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS
(MAR 2012)

* * * * *

15. Amend section 52.225-23 by—

a. Revising the date of the clause;

b. In paragraph (a) in the definition "Designated country" removing from paragraph (2) "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place; and

c. In paragraph (a) in the definition "Recovery Act designated country" removing from paragraph (2) "Honduras, Mexico" and adding "Honduras, Korea (Republic of), Mexico" in its place.

The revised text reads as follows:

**52.225-23 Required Use of American Iron, Steel, and
Manufactured Goods—Buy American Act—Construction Materials
under Trade Agreements.**

* * * * *

REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—BUY
AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (MAR 2012)

* * * * *

[BILLING CODE 6820-EP]

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